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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

JESSICA L. HAYDEN, NICOLE C. MERRILL and COLLEEN M. RHOADS,

Petitioners,

vs.

RICHARD GRAYSON, CHIEF OF POLICE OF THE TOWN OF LISBON, N.H.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

ROBIN C. CURTISS
Counsel of Record
VAN DORN, CULLENBERG & TENSEN
Attorneys for Petitioners
P.O. Box 263
Main Street, Route 10
Orford, NH 03777-0263
(603) 353-4000

146008

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

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QUESTION PRESENTED

Does the Equal Protection Clause of the United States Constitution prohibit a police policy which provides less protection to child victims of domestic sexual abuse than other victims of crime if the policy lacks a rational basis?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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The opinion of the United States Court of Appeals for the First Circuit appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court for the District of New Hampshire appears at Appendix E to the petition and is unpublished.

STATEMENT OF JURISDICTION

The decision sought to be reviewed was made and entered by the United States Court of Appeals for the First Circuit on January 22, 1998. This decision affirmed the judgment of the United States District Court for the District of New Hampshire dated March 13, 1997, finding that respondent's motion for summary judgement should be granted because petitioners failed to show that respondent Grayson acted with discriminatory motive or intent.

The jurisdiction of this Court is invoked in accordance with 28 U.S.C. § 1254(1) and United States Supreme Court Rules Rule 10(a) and 10(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

United States Constitution, Amendment XIV Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

United States Supreme Court Rules

> Rule 10. Considerations Governing Review on Certiorari
>
> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) * * *

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

* * *

STATEMENT OF THE CASE

Petitioners Colleen Rhoads, Jessica Hayden and Nicole Merrill are sisters. In approximately 1977, when they were 15, 9, and 7 years old respectively, their family moved to Lisbon, New Hampshire. Hervey Gagnon was Colleen and Jessica's adoptive father and Nicole's natural father. From the time the petitioners were young girls until they were teenagers, Mr. Gagnon subjected them to a regular course of severe sexual abuse which included fondling, forced acts of masturbation, fellatio and sexual intercourse.

In 1983, Colleen and Jessica disclosed the abuse to their mother, Sylvia Kinne, who immediately removed Mr. Gagnon from the home and soon thereafter divorced him. At this time, Sylvia, Colleen and Jessica also went to the Lisbon Police Department and reported the sexual abuse to respondent Grayson. Their reporting included detailed, comprehensive written statements, as well as verbal reports.

Except for taking these statements, respondent Grayson did not respond to the allegations of sexual abuse. After several inquiries as to the status of the complaints, respondent Grayson

lied to petitioner Rhoads, and, on separate occasions, her mother,[1] telling them that the County Attorney would not bring the charges. In reality, neither respondent Grayson nor anyone in the Lisbon Police Department ever reported the crimes to the County Attorney.

Years passed without action from the respondent, even after Mr. Gagnon broke into the petitioners' home and tore the telephone off the wall. During these years, Gagnon continued to stalk and harass the petitioners. Finally, in 1990, petitioners provided statements about the abuse to Lisbon police officer Linda Dunn, who brought this matter to the attention of the County Attorney. The respondent made incriminating statements at this time. In 1990, the Grafton County Grand Jury indicted Gagnon on charges of aggravated felonious sexual assault against all three petitioners. The charges concerning petitioner Rhoads were subsequently dismissed because the statute of limitations had passed. A plea bargain was entered regarding the other charges and Grayson was sentenced to 11-22 years in prison.

Distraught over the lack of response to their original reports of abuse, on March 3, 1993, petitioners filed an action against Grayson and the Town of Lisbon in the United States District Court for the District of New Hampshire. Petitioners' action, brought pursuant to 42 U.S.C. § 1983, alleged that Grayson

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1. The First Circuit's opinion erroneously states that the petitioners did not contest evidence that their mother told Grayson "she did not want the girls involved in a prosecution." Order of the United States Court of Appeals for the First Circuit dated January 22, 1998, ("Appellate Order") App. A at 6a, n.6. In their appellate brief, petitioners' statement of facts explained that their mother also asked Grayson about the status of the case, and was told by Grayson that he could not press charges against Gagnon because the county attorney would not prosecute the case. Petitioners' Appellate Brief at 2.

and the town violated the petitioners' equal protection rights under the Fourteenth Amendment to the United States Constitution by failing to investigate and pursue the petitioners' report of sexual abuse either because the petitioners were female, children, or victims of domestic sexual abuse.

On November 8, 1996, respondent Grayson filed a motion for summary judgment on the petitioners' equal protection claim.[2] The trial court, the United States District Court for the District of New Hampshire, granted the respondents' motion for summary judgment on March 13, 1997. *See* Order of the United States District Court for the District of New Hampshire dated March 13, 1997 (the "Trial Order"). The court stated that the petitioners produced sufficient evidence to create a reasonable inference that Chief Grayson had a policy of providing less police protection to child victims of domestic sexual abuse than to victims of other crimes. Trial Order, App. E at 25a, n.6. However, the court held that petitioners failed to establish that, in instituting the policy, Chief Grayson was motivated by discriminatory intent. Trial Order, App. E at 23a. Petitioners filed a motion for reconsideration, which was denied. Judgement was entered on May 8, 1997, and petitioners appealed to the First Circuit Court of Appeals. The First Circuit Court of Appeals also held that the petitioners failed to prove discriminatory intent and, on January 22, 1998, affirmed the lower court's judgment.

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2. The town, an original defendant, was dismissed from this suit in August, 1993. Petitioners later sought to amend their complaint to assert additional claims against the town. The petitioners' request was denied, a matter affirmed by the First Circuit. This, and related portions of the Appellate Order should be reviewed if the Court agrees that discriminatory intent did not have to be proven.

REASONS FOR GRANTING THE WRIT

I.

THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION PROHIBITS A POLICE POLICY WHICH PROVIDES LESS PROTECTION TO CHILD VICTIMS OF DOMESTIC SEXUAL ABUSE THAN OTHER VICTIMS OF CRIME IF THE POLICY LACKS A RATIONAL BASIS.

Chief Grayson's policy of providing less police protection to victims of domestic sexual abuse is patently irrational. It offends a fundamental precept of American jurisprudence: that all state action must have at least a rational basis. *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 446 (1985); *Vacco v. Quill*, __ U.S. __, No. 95-1858 slip op. at 1-2 (June 26, 1997). Accordingly, if a governmental actor (like Chief Grayson), through statute, policy, or custom, classifies members of a non-protected class (like petitioners) such classification must be rationally related to a legitimate state interest. *Id.* The fact that Chief Grayson's policy was unwritten does not change this analysis. *Monell v. Dep't. of Social Services*, 436 U.S. 658, 690-691 (1978); *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). No matter how the policy was instituted, to withstand an equal protection challenge, it must be grounded in rationality. *See San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

At the summary judgment stage, the district court recognized that the petitioners:

> have produced enough evidence to raise a reasonable inference that the defendant had a custom of

> providing less protection to child victims of domestic sexual abuse than to the victims of similar crimes.

See Trial Order, App. E at 25a, n.6; *see also* Trial Order, App. E at 25a, n.5. Because the petitioners produced sufficient evidence that a discriminatory policy existed, the proper inquiry should have been whether a rational basis was articulated for the policy. *Cleburne*, 473 U.S. at 440, 446; *Royster Guano*, 253 U.S. at 415. However, the respondent never proffered a rational basis for the policy. If the respondent cannot justify his policy, it is improper for the Court to do so. *See McGinnis v. Royster*, 410 U.S. 263, 277 (1993) (holding that is it not for a court to supply an "imaginary basis or purpose" for a challenged distinction, but that someone apart from the court must come forward with evidence that the distinction rationally furthers some *articulated* legitimate purpose); *see also Kramer v. Union Free School District No. 15*, 395 U.S. 621, 632 (1969) ("classifications must be tailored . . . to achieve the *articulated* . . . goal" (emphasis added).

Nonetheless, the appellate court gratuitously supplied a justification for the policy, stating:

> [t]hese unaddressed ambiguities plainly invited a *rational inference* that the challenged nonintervention policy was predicated on a generalized concern for family integrity and privacy . . .

See Appellate Order, App. A at 7a, n.8 (emphasis added). Such rank juristic speculation merely renders the rational basis standard "toothless," something this Court has stated adamantly that it wishes to avoid. *See Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). The respondent's failure to articulate a rational basis for the policy should have been fatal to his summary judgment

motion. *See Cellini v. City of Sterling Heights*, 856 F. Supp. 1215, 1220 (E.D. Mich. 1994) (citing *San Antonio School District*, 411 U.S. at 55).

Furthermore, there is no rational basis for the policy. A police department may not selectively deny its protective services to certain disfavored minorities, like the class petitioners were members of. *DeShaney v. Winnebago Social Services Dep't.*, 489 U.S. 189, 197, n.3 (1989). Yet, this is precisely what Chief Grayson did. He decided, whatever his discriminatory motivation, that child victims of domestic sexual abuse and rape were not entitled to the same police protection as everyone else. Arguably, the rationale supplied by the appellate court, "notions of family integrity and privacy," justifies nonintervention in certain domestic violence cases. However, the denial of police protection is completely inappropriate in situations where children are sexually assaulted and raped. Grayson's policy of failing to address this horrific abuse is not rationally related to a concern for family privacy. It is simply and irrefutably irrational and discriminates impermissibly against members of the petitioners' class.

II.

THE LOWER COURTS ARE DIVIDED AS TO WHETHER PROOF OF DISCRIMINATORY MOTIVE IS NECESSARY TO INVALIDATE POLICIES OF PROVIDING LESS POLICE PROTECTION TO VICTIMS OF DOMESTIC VIOLENCE.

In granting and affirming summary judgment, both the district court and the appellate court improperly considered whether the petitioners adduced proof of respondent's discriminatory motive. Trial Order, App. E at 23a-26a; Appellate Order, App. A at 5a-9a. In so doing, the courts relied on the test

annunciated in *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 71 (1997).[3] The second prong of the *Soto* test requires proof of discriminatory intent or motive. *Id.* at 1066-1067. However, proof of discriminatory intent is unnecessary here because, unlike the policy in *Soto*, the policy at issue is *overtly* or *facially* discriminatory. *See Wayte v. United States*, 470 U.S. 598, 608-609, n.10 (1985) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1879)).

In *Soto*, the challenged policy was *neutral* as to the identified class (women). *Soto*, 103 F.3d at 1065-1066. Thus, in order to benefit from so-called middle tier scrutiny, the plaintiffs had to prove that the policy was motived by discriminatory intent. *See Personal Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). By contrast, when a policy or custom is overtly discriminatory, like the policy at issue here, proof of discriminatory intent is unnecessary. *Wayte*, 470 U.S. at 608-609, n.10; *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-196 (1983)[4]. Rather, when the existence of an overtly discriminatory policy is established, the burden shifts to the state actor to supply the appropriate rationale for the policy. *Id.*; *see also Royster Guano Co.*, 253 U.S. at 412; *City of Cleburne*, 473 U.S. at 432.

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3. The *Soto* test is culled from several earlier cases. *See, e.g. Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988); *Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026 (3rd Cir. 1988).

4. As the *Exxon* Court explained, if a challenged provision does not involve a fundamental interest or a suspect class, it "need only be tested under the lenient standard of rationality that this Court has traditionally applied in considering equal protection challenges to regulation of economic and commercial matters." *Exxon*, 462 U.S. at 195-196 (citations omitted). It is illogical that petitioners, challenging policies that discriminate against child victims of domestic sexual assault, should have to surmount hurdles that litigants challenging economic and commercial policies do not have to surmount.

The lower courts are divided as to whether proof of the government actor's discriminatory motive or intent is necessary to invalidate analogous police nonintervention policies in domestic violence cases.[5] The division between the Ninth and Tenth Circuits is particularly apparent.[6] *See Watson v. Kansas*

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5. Cases involving an identifiable class of domestic violence victims in which the plaintiff did not have to prove discriminatory intent include: *Navarro v. Block*, 72 F.3d 712 (9th Cir. 1995); *Cellini v. City of Sterling Heights*, 856 F. Supp. 1215, 1220-1221 & n.4 (E.D. Mich. 1994); and, *Smith v. City of Elyria*, 857 F. Supp. 1203 (N.D. Ohio 1994).

Cases where the plaintiff had to prove discriminatory intent include: *Watson v. Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988); *Hakken v. Washtenaw County*, 901 F. Supp. 1245, 1249 (E.D. Mich. 1995); and, *Semple v. City of Moundsville*, 963 F. Supp. 1416, 1432 (N.D. Va. 1997).

6. The Ninth Circuit separately evaluated claims based on gender and victim status even though the claims involved the same policy. *Navarro v. Block*, 72 F.3d 712, 716-717 (9th Cir. 1995). Regarding the gender claim, the court found that the county's custom of treating domestic violence calls differently from non-domestic violence calls was gender neutral on its face. *Id.* at 716. Because the custom was gender neutral, next the inquiry shifted to discriminatory intent. *Id.* However, the court evaluated plaintiff's claim as a member of the victim class differently. *Id.* at 717. The policy that was neutral as to gender was *not* neutral as to victims. Thus, as the court explained:

> even absent evidence of gender discrimination, the [plaintiff's] equal protection claim still survives because they could prove that the domestic violence/non-domestic violence classification fails even the rationality test.

Id. Accordingly, once the court identified a policy which overtly discriminated against identifiable class on its face, it did not require proof of discriminatory intent. *Id.*

City, 857 F.2d 690 (10th Cir. 1988); *Navarro*, 72 F.3d 712. Part of the confusion stems from the fact that policies which discriminated facially against only the victim class were challenged on gender based grounds.[7]

It is time for this Court to craft a bright line distinction in these cases. If a nonintervention policy is *overtly* or *facially* discriminatory as to the identified class, be it gender or victim class status, the onus must shift to the government to supply the appropriate rationale. For non-protected classes, this means a rational basis. This approach would ensure that all non-protected classes are treated the same, whether the class is based on economics, victim status or some other non-protected classification.

It is vital that this Court give the lower courts appropriate guidance on the proper standard to be applied. If an unwritten policy discriminates overtly, requiring victims to furnish proof of the government's or government actor's motive is truly an impermissible burden.[8] A statute may at least include a

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7. In certain cases the courts have held that plaintiffs must prove discriminatory intent as to an identified class of women. In these cases, plaintiffs failed to assert the classification of victims of domestic violence, a class which the subject policy arguably discriminate against overtly. *See, e.g. Soto v. Flores*, 103 F.2d 1056 (1st Cir. 1997) (dicta indicates the court would apply the same test requiring intent to a class of domestic violence victims); *Brown v. Grabowski*, 922 F.2d 1097 (3rd Cir. 1990), *cert. denied*, 501 U.S. 1218; and, *Ricketts v. City of Columbia*, 36 F.3d 775, 781 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1838 (1995).

8. Many of the cases which require the showing of intent cite *Arlington Heights v. Housing Corp.*, 429 U.S. 252, 264-271 (1977) as the legal basis for such a requirement. *See, e.g. Watson v. Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988); *Hakken v. Washtenaw County*, 901 F. Supp. 1245, 1249 (E.D. Mich. 1995). In *Arlington Heights*, the state action at issue was not overtly discriminatory; consequently, the court (Cont'd)

legislative history which discusses intent. In the case of a lone governmental actor like Grayson, establishing exactly what motivated him to discriminate may be impossible. The sounder rule is not to require proof of motive in the face of an overtly discriminatory policy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBIN C. CURTISS
Counsel of Record
VAN DORN, CULLENBERG
& TENSEN
Attorneys for Petitioners
P.O. Box 263
Main Street, Route 10
Orford, NH 03777-0263
(603) 353-4000

(Cont'd)
discussed the need for the plaintiff to prove intent. *See Arlington Heights*, 429 U.S. at 257-258. Later courts cited the court's dicta as supporting the argument that intent is an element in all equal protection cases, including cases involving overt, facially discriminatory classifications. However, since *Arlington Heights* involved a facially neutral policy, it should not be construed as requiring plaintiffs to prove intent in cases involving overt discrimination.

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JANUARY 22, 1998

No. 97-1623

JESSICA L. HAYDEN, NICOLE C. MERRILL AND COLLEEN M. RHOADS,

Plaintiffs, Appellants,

v.

RICHARD GRAYSON, CHIEF OF POLICE OF THE TOWN OF LISBON, ET AL.

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Joseph A. DiClerico, Jr., *U.S. District Judge*]

Before
Boudin, *Circuit Judge*,
Godbold* and Cyr, *Senior Circuit Judges*.

Edward M. Van Dorn, Jr., with whom *Brad W. Wilder* and *Van Dorn & Cullenberg* were on brief for appellants.

John T. Alexander, with whom *Michael Lenehan* and *Ransmeier & Spellman P.C.* were on brief for appellees.

January 22, 1998

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* Of the Eleventh Circuit, sitting by designation.

Appendix A

CYR, *Senior Circuit Judge.* Plaintiffs appeal from a district court judgment dismissing their equal protection claims against the Town of Lisbon, New Hampshire, and its chief of police, Richard Grayson, for failing to investigate allegations that their father abused them sexually while they were minors. We affirm.

I

BACKGROUND

Although the three sisters first lodged these allegations in 1983, Grayson took no action other than to misrepresent that the district attorney had declined to prosecute. Seven years later, after attaining their majority, plaintiffs discovered Grayson's misrepresentation and took their allegations to the district attorney. Their father presently is serving a lengthy prison sentence, following his conviction for aggravated sexual assault.

Plaintiffs filed the instant action against the Town and Grayson, in his individual and official capacities, claiming *inter alia* that Grayson refrained from investigating their allegations either because plaintiffs were female, children, or victims of domestic sexual abuse, and that such selective law enforcement violated their individual rights under the Equal Protection Clause. *See* U.S. Const. amend XIV; 42 U.S.C. § 1983.[1] In due course, the equal protection count against the Town was dismissed for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). Following discovery, defendant Grayson was awarded summary judgment on the individual-capacity claim because plaintiffs had failed to adduce sufficient evidence that he intended to discriminate due to their membership in any of the three

1. It is undisputed that Grayson at all times acted under color of state law. *See* 42 U.S.C. § 1983.

classes alleged in their complaint. The district court thereafter denied plaintiffs' postjudgment motion for reconsideration. *See* Fed. R. Civ. P. 59.

II

DISCUSSION

A. *The Equal Protection Claim Against Grayson*[2]

The Fourteenth Amendment mandates that no State "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV. Thus, although there is no constitutional right to police protection, State executive and law enforcement officials may not "selectively deny . . . protective services to certain disfavored minorities." *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989).

Plaintiffs rely on *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985), for their contention that the district court should not have applied the equal protection test governing race and gender classifications, which necessitated that plaintiffs show that Grayson acted with discriminatory intent. Instead, plaintiffs argue, in cases involving less invidious but nonetheless arbitrary classifications, such as child victims of domestic sexual abuse, *Cleburne* simply envisions that plaintiffs prove that the

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2. After examining all competent evidence in the light most favorable to the party opposing summary judgment, we are required to make a *de novo* determination as to whether a trialworthy issue remained or the moving party was entitled to judgment as a matter of law. *See Dominique* v. *Weld*, 73 F.3d 1156, 1158 (1st Cir. 1996).

defendant's decision lacked a "rational basis," without regard to any discriminatory intent.[3]

Plaintiffs misconstrue the *Cleburne* decision. There the Supreme Court expressly noted the finding made by the district court that the municipality's principal reason for denying the requested zoning permit had been "that the residents of the [plaintiff] home would be persons who are mentally retarded," *id.* at 437, a finding which was never challenged on appeal. Thus, it was only because the city's discriminatory motive had been established *ab initio* that the Court addressed whether the city need demonstrate a "compelling" or "important" state interest — criteria theretofore reserved for race and gender discrimination — or need simply articulate a "rational basis" for its decision. *Id.* at 440-41. Accordingly, *Cleburne* did not hold that no threshold proof of intent to discriminate is required in cases involving less invidious arbitrary classifications.[4]

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3. The Equal Protection Clause safeguards not merely against such invidious classifications as race, gender and religion, but any arbitrary classification of persons for unfavorable governmental treatment. *Cf. Wayte* v. *United States*, 470 U.S. 598, 608 (1985) (noting, in relation to selective prosecution cases, that "the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or *other arbitrary classification*' ") (emphasis added; citations and internal quotation marks omitted).

4. The other case relied upon by plaintiffs in this regard is to the same effect. *See Navarro* v. *Block*, 72 F.3d 712, 715-16 (9th Cir. 1996) (vacating summary judgment for County on equal protection claim because there existed a trialworthy issue as to whether County policy according different treatment to domestic and nondomestic violence had a "rational basis," but only *after* the County had conceded, *arguendo* on appeal, "that it had a policy of affording victims of domestic violence less police protection").

Appendix A

The motivation underlying a municipal decision is not always so apparent as in *Cleburne*, of course, especially if the challenged decision does not expressly single out a particular class of persons for disadvantageous treatment. Even in such instances, however, members of the plaintiff class quite understandably may consider it no mere coincidence that a facially neutral decision causes a disproportionately unfavorable impact on their particular class. Nevertheless, even evidence of a widely disproportionate impact on the plaintiff class normally is not enough, standing alone, to establish an equal protection violation. *See, e.g., Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 274-75 (1979) (upholding veteran's preference in civil service hiring, although vast majority of veterans hired were male). Rather, plaintiffs must adduce competent evidence of "purposeful discrimination." *Washington* v. *Davis*, 426 U.S. 229, 243-44 (1976); *Soto* v. *Flores*, 103 F.3d 1056, 1067 (1st Cir.), *cert. denied*, 118 S. Ct. 71 (1997).

The burden is an onerous one: " 'Discriminatory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a course of action at least in part '*because of*,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279 (emphasis added; citation omitted); *Soto*, 103 F.3d at 1067. Thus, unless these plaintiffs established the requisite discriminatory intent, their equal protection claim cannot succeed even assuming the Grayson decision not to investigate lacked a "rational basis." *See Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Semple* v. *City of Moundsville*, 963 F. Supp. 1416, 1433 (N.D. W. Va. 1997).

Plaintiffs claim that the district court disregarded competent evidence that Grayson harbored "archaic stereotypes" regarding

female-child sexual abuse in the home and singled out its victims for unfavorable treatment in determining whether to investigate. The record does not support their contention, however.[5]

At no time did Grayson indicate to anyone that he would not investigate allegations of child sexual abuse in the home because he thought the victims were undeserving of equal law enforcement protection. Instead, he explained to a fellow officer that he had refrained from investigating plaintiffs' allegations at their mother's request.[6] Another police officer confirmed that it was Grayson's policy not to intervene where a family member (*e.g.*, nonabusive parent or spouse) requested that there be no investigation.

Plaintiffs essentially claim, nonetheless, that their evidence supported, respectively, rational inferences that Grayson

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5. Plaintiffs adduced no evidence that Grayson's reluctance to pursue criminal investigations was based on their gender. On the contrary, plaintiffs proffered evidence that Grayson failed to investigate a 1990 allegation that a 12-year-old boy had been sexually molested by his grandfather. Nor did plaintiffs adduce statistical or other evidence relating to whether females comprise a majority of (1) sexual abuse victims; (2) domestic sexual abuse victims; (3) sexually abused minors; or (4) minors sexually abused in the home. Furthermore, Officer Boutin attested that though Grayson often did not pursue allegations of crimes committed against children if a nonoffending adult family member urged him not to do so, this "policy" did not depend on whether the victims were male or female. *See infra* note 8. Given its serious deficiencies, the gender classification claim quite properly was rejected by the district court.

6. Specifically, the mother told Grayson that "she did not want the girls involved in a prosecution." Plaintiffs have not contested this evidence.

intended to treat all domestic crime differently from nondomestic crime, all crimes against children differently from crimes against adults, and all sexual abuse crimes differently from nonsexual crimes.[7] Once again the evidence does not bear out their claim.

Plaintiffs' proffer disclosed that the nonintervention policy attributed to Grayson may have been much broader than plaintiffs allow, in that it applied not merely to domestic child sexual abuse, but to other crimes in circumstances where general concerns for family integrity and family privacy predominated.[8] Thus, their proffer may be seen to belie their contention that Grayson sought to discriminate against them *because of*, rather

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7. The district court reserved the question whether the evidence relating to Grayson's own statements would be admissible. *See* Fed. R. Evid. 801(d)(2) (admission by party-opponent).

8. In the portion of Officer Boutin's deposition proffered below, the inquiry is ambiguously phrased by plaintiffs in terms of how Grayson acted "in these kinds of cases" compared to "other [ ] more conventional kinds of crimes," without particularizing any *characteristic* of these alleged crimes which was unconventional in their view (*e.g.*, domestic, sexual abuse, or crimes against children or female victims), or which triggered the Grayson nonintervention policy. Perhaps for this very reason, then, Officer Boutin ambiguously responded that the police "took into [account] what the *mother* had to say *or* the *victim*'s rights were, I mean, emotions were," and "if the *family*'s wishes were that it didn't get prosecuted, then it didn't." Although Boutin allowed that the Grayson nonintervention policy would apply to crimes against children, at no time did he state that it applied exclusively to such crimes. These unaddressed ambiguities plainly invited a rational inference that the challenged nonintervention policy was predicated on a generalized concern for family integrity and privacy, which would be activated, for example, at the instance of a nonoffending spouse even though the allegations may have related to nonsexual criminal activity directed against an adult family member.

than *in spite of*, their status as victims of child sexual abuse in the home. *See Feeney*, 422 U.S. at 279. Far from demonstrating general condonation of child sexual abuse in the home, therefore, the proffer simply supported a reasonable inference that Grayson would investigate virtually *any allegation of crime absent* an appropriate request from a nonoffending spouse to refrain from intervention in circumstances where legitimate, competing family interests were thought to predominate. Accordingly, although the evidence may well have demonstrated that the Grayson nonintervention policy had a disproportionate adverse impact in cases involving allegations relating to the various victim classes in which plaintiffs claimed membership, it did not demonstrate that Grayson harbored a discriminatory animus toward those victim classes. *Id.* at 274 (upholding veteran's preference in civil service hiring, even though vast majority of veteran hirees were male).

Similarly, plaintiffs presented evidence that Grayson, on two other occasions, failed to investigate allegations of child sexual abuse in the home. Once again, however, there was no evidence that Grayson was motivated by a discriminatory animus, as distinguished from a neutral nonintervention policy. Moreover, Grayson proffered undisputed evidence that he had investigated at least two other domestic child sexual abuse cases, as well as eight nondomestic child sexual abuse cases. *Cf. Willhauck* v. *Halpin*, 953 F.2d 689, 712 (1st Cir. 1991) (in analogous context of equal protection claim founded on selective prosecution, "[i]t must be shown that others similarly situated have not been prosecuted and that the decision to prosecute has been motivated by an impermissible reason").

Finally, in an ironic twist, the discriminatory focus essential to plaintiffs' equal protection claims was irredeemably blurred

by their proffer that the Grayson nonintervention policy extended well beyond domestic child sexual abuse cases (*e.g.*, to DWI and vandalism), and may even have been due to Grayson's dishonesty, chronic lassitude, alcohol abuse, or desire to wage personal vendettas against particular individuals rather than groups. *See New Burnham Prairie Homes, Inc.* v. *Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990) (noting that "[d]iscrimination based merely on individual, rather than group, reasons will not suffice" to establish equal protection violation). That is to say, although their scattershot approach might enable a rational inference that Grayson was a poor police chief, it cannot sustain a nonspeculative inference that he failed to investigate these allegations *because* plaintiffs were children who had been sexually abused, or *because* plaintiffs had been sexually abused in the home. *See Soto*, 103 F.3d at 1072 ("Whether this deplorable scenario is actionable under Puerto Rican law we leave, as we must, to others.").[9]

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9. The district court denied plaintiffs' postjudgment motion for reconsideration, *see* Fed. R. Civ. P. 59, because their "new" evidence of discriminatory intent had been available at summary judgment. Plaintiffs respond that Grayson's motion for summary judgment failed to put them on adequate notice that he disputed their allegations of discriminatory intent. We review the Rule 59 decision only for manifest abuse of discretion. *See Vasapolli* v. *Rostoff*, 39 F.3d 27, 36 (1st Cir. 1994).

The Grayson motion could not have been more explicit: "Defendant Grayson denies any intent to discriminate against the plaintiffs on any basis." Further, "[t]he plaintiffs have produced no evidence suggesting that defendant Grayson wanted to harm them because they were women, or because they were minors, or because they were alleged victims of sexual assaults." True, plaintiffs' default may flow from their misreading of *Cleburne*. *See supra* pp. 3-4. Nevertheless, "[Rule 59] does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Aybar* v. *Crispin-Reyes*, 118 F.3d 10, 16 (1st Cir. 1997).

Appendix A

B. *The Equal Protection Claim Against the Municipality*

The district court dismissed the equal protection count against the Town for failure to state a claim. *See* Fed. R. Civ. P. 12(b) (6). Eighteen months later, plaintiffs moved to reinstate and amend the claim, *see* Fed. R. Civ. P. 15, to allege that the Town should be held liable either because Grayson was the municipal official who instituted the official "policy" against providing law-enforcement protection to child victims of sexual abuse in the home, *see Monell* v. *Department of Social Servs. of New York*, 436 U.S. 658, 694-95 (1978), or because the Town failed to train Grayson adequately to deal with domestic child sexual abuse, which constituted "much" or "most" of the crime in the community.

The district court denied the motion to amend, on the ground that its earlier Rule 12(b) (6) dismissal amounted to a decision "on the merits" and, accordingly, the law of the case.[10] Even assuming the rationale for the instant decision were to be found infirm, *see Griggs* v. *Hinds Junior College*, 563 F.2d 179, 180 (5th Cir. 1977) (noting that Rule 15 amendment is "especially appropriate [ ] . . . when the trial court has dismissed the complaint for failure to state a claim"); *see also Dussouy* v. *Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 n.2 (5th Cir. 1981), we would affirm on the ground that the proposed amendment would have been futile. *See Levy* v. *FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

Rule 15 permits the trial court to deny leave to file an amended complaint which would be subject to immediate dismissal under Rule 12(b) (6) for failure to state a viable claim

10. We review the Rule 15 decision for abuse of discretion. *RTC* v. *Gold*, 30 F.3d 251, 253 (1st Cir. 1994).

for relief. *See Foman* v. *Davis*, 371 U.S. 178, 182 (1962); *Mills* v. *State of Me.*, 118 F.3d 37, 55 (1st Cir. 1997). The Town cannot be held vicariously liable in an action under section 1983 unless its official policy or custom was the "moving force" behind the alleged violation of constitutional rights. *See Monell*, 436 U.S. at 694.[11] Normally, therefore, a municipality cannot be held liable unless its agent actually violated the victim's constitutional rights. *See City of Los Angles* v. *Heller*, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of [any] individual police officer, the fact that the departmental regulations might have authorized [unconstitutional action] is quite beside the point.").

Plaintiffs simply allege that the Town is liable under section 1983 because Grayson established an official Town policy or custom of selective law enforcement which in turn caused them injury.[12] Since their predicate claim against Grayson fails, however, *see supra* Section II.A, so must their contention that any such discriminatory Town policy or custom existed.

Alternatively, of course, the Town could be held liable under section 1983 were it to appear that the injury to plaintiffs was caused by the Town's *failure to train* Grayson. The liability criteria for "failure to train" claims are exceptionally stringent, however. *See City of Canton* v. *Harris*, 489 U.S. 378, 388-89, 391 (1989).

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11. Municipal customs, for § 1983 purposes, are "such practices of state officials . . . [as are] so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.* at 691.

12. We assume *arguendo* that Grayson, as police chief, was a Town policymaker with respect to law enforcement.

Only if the failure to train "amounts to *deliberate indifference* to the rights of persons with whom the police come into contact," and is "closely related" to, or "the moving force" behind, the constitutional injury, can the claim against the municipality prevail. *Id.* (emphasis added). For this "deliberate or conscious choice" to have been established, plaintiffs needed to present evidence that (1) the Town knew when it hired Grayson that the risk of future equal protection violations arising and recurring in domestic child sexual abuse cases was "so obvious" that its failure to train him therein likely would result in continued violations; *or* (2) even though the initial risk of recurring constitutional violations was not "so obvious," the Town subsequently learned of a serious recurrence, yet took no action to provide the necessary training. *Id.* at 390 & n.10; *see also id.* at 396 (O'Connor, J., concurring in part).[13]

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13. We have considerable doubt whether the failure-to-train claim survived either the dismissal of the § 1983 claim against Grayson, individually, *see supra* Section II.A, or the *Monell* policy-based claims against the Town and Grayson, in his official capacity, *supra*. If Grayson never violated plaintiffs' constitutional rights in the first instance, it is difficult to see how a failure to train him could have *caused* any "constitutional injury" to plaintiffs. *Compare Evans* v. *Avery*, 100 F.3d 1033, 1040 (1st Cir. 1997) (affirming dismissal of § 1983 substantive-due-process claim against City where its agents were found not to have violated plaintiff's constitutional rights) (citing *Heller*, 475 U.S. at 799), *with Simmons* v. *City of Philadelphia*, 947 F.2d 1042, 1063 (3d Cir. 1991) (holding that city policymakers, who owed an independent duty to pretrial detainees, were individually liable under § 1983 for prisoner suicide, even though factfinder determined that the turnkey had not violated prisoner's constitutional rights); *de Feliciano* v. *de Jesus*, 873 F.2d 447, 450 (1st Cir. 1989) ("There may well be a basis for an agency's liability other than the conduct of the individual defendants that the jury exonerated."). *See generally* Barbara Kritchevsky, *Making Sense*

(Cont'd)

Appendix A

To begin with, plaintiffs merely allege that "Lisbon *is* a high crime area in northern Grafton County [and] that much or most of the crime committed in northern Grafton County *involves* domestic violence and sexual abuse." (Emphasis added.) There is no allegation that these circumstances obtained in 1975, however, when Grayson became the police chief. No less importantly, even assuming similar circumstances prevailed in 1975, the need to train Grayson was not "so obvious, [nor] the [alleged] inadequacy [of the training] so likely to result in the violation of constitutional rights, that the [Town] can reasonably be said to have been deliberately indifferent to the need [for training]." *City of Canton*, 489 U.S. at 390.

It bears reminding that the gravamen of the amended complaint is not that Grayson did not adequately investigate these allegations, but that he purposely chose not to investigate them at all. It is reasonable to observe, therefore, that whatever *relevant* training the Town failed to give Grayson would not have entailed specialized law-enforcement investigatory skills, but simply the commonplace understanding that police officers may not deny law-enforcement protection based simply on their arbitrary classifications of various groups of crime victims.

Thus, the amended complaint asserted no sufficient basis for concluding that Town policymakers reasonably should have anticipated that a new police chief would need specialized

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(Cont'd)
of State of Mind: Determining Liability in Section 1983 Municipal Liability Litigation, 60 Geo. Wash. L. Rev. 417, 445-73 (1992) (summarizing conflicting case law). Nevertheless, assuming *arguendo* that dismissal of the individual-capacity claim against Grayson would not necessitate dismissal of the failure-to-train claim against the Town, the proffered amendment would still be futile due to the stringent definition of "deliberate indifference" prescribed in *City of Canton*.

instruction in so rudimentary a law-enforcement responsibility, nor that the Town had been put on notice that such equal-protection violations were routine occurrences in domestic child sexual abuse cases, either locally or elsewhere. Rather, unlike many other law-enforcement responsibilities, *cf.*, *e.g.*, *id.* at 390 & n.10 (noting that it might be considered "obvious" that armed police officers assigned to arrest fleeing felons would need instruction regarding constitutional limitations on proper use of deadly force), the Equal Protection Clause bar against arbitrary law enforcement is neither obscure nor problematic of application.[14]

Finally, plaintiffs have not alleged that the Town was ever placed on notice that Grayson, *after* he was appointed in 1975, routinely violated the equal protection rights of citizens by

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14. *City of Canton* requires not only deliberate indifference but that the alleged failure to train be shown to have been the "closely related" cause of the constitutional injury. *Id.* at 390-91. As Grayson was a policymaking official, with discretion in law enforcement matters, plaintiffs were required to prove that he acted with "*purposeful* discrimination." Yet there has been no showing that whatever training was not provided to Grayson could have thwarted any such purposeful discrimination. Whereas law enforcement training might inform an officer about the proper methods to be used in mediating and diffusing crimes of domestic violence, for example, it does not necessarily follow that an officer *intent* on discriminating against a particular class of crime victims would be deterred from doing so by "enlightenment" training, especially given the contraindications implicit in plaintiffs' other evidence that the challenged decisionmaking by Grayson resulted from alcohol abuse, lassitude, or personal animosity toward individuals. *See Angel* v. *City of Fairfield*, 793 F.2d 737, 739 (5th Cir. 1986) ("Here, Angel has failed to allege how the failure to train resulted in the denial of his right to equal protection of the laws.").

engaging in selective and arbitrary law enforcement. *See Swain* v. *Spinney*, 117 F.3d 1, 11 (1st Cir. 1997) (lack of notice of prior constitutional violations defeats failure-to-train claim). Accordingly, we conclude that the proposed amendment to the complaint would have been futile.[15]

Needless to say, our conclusion represents no endorsement of the conduct with which Grayson is charged in the complaint. It would be dereliction of duty for a police chief to turn over to private parties the decision whether a serious offense should be pursued and it is hard to imagine what might justify telling a complainant falsely that the prosecutor would have no interest in the complaint. Nevertheless, not every form of misconduct is a constitutional violation — most wrongs find their remedy under state law — and our present holding is simply that the allegations made in the complaint do not properly assert a violation of the Equal Protection Clause.

Affirmed.

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15. As no "federal question" claims remain, we also affirm the district court's discretionary decision not to exercise its supplemental jurisdiction over plaintiffs' state-law claims for negligence and intentional infliction of emotional distress against the Town and Grayson. *See* 28 U.S.C. § 1367(c) (3).

APPENDIX B — POST JUDGMENT JUDGMENT #1 OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE FILED MAY 8, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 93-112-JD

Jessica L. Hayden. et al

v.

Richard Grayson

POST JUDGMENT JUDGMENT #1

In accordance with the Order dated May 7, 1997 by Chief Judge Joseph A. DiClerico, Jr. and the judgment entered March 14, 1997, post judgment judgment #1 is hereby entered.

By the Court,

s/ James R. Starr
Clerk

May 8, 1997

cc: Edward M. Van Dorn, Jr., Esq.
Michael Lenehan, Esq.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE GRANTING MOTION FOR RECONSIDERATION FILED MARCH 7, 1997

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 93-112-JD

Jessica L. Hayden. et al.

v.

Richard Grayson

ORDER

Before the court is the plaintiffs' motion (1) to amend the judgment; and (2) for reconsideration of the court's order of March 13, 1997, granting summary judgment to the defendant (document no. 60). The plaintiffs make numerous arguments in support of this motion, none of which require extensive analysis.[1]

The plaintiffs' "new" evidence is not properly before the court because the plaintiffs have not shown that the information was unavailable for opposing the motion for summary judgment. Therefore the court does not consider it. Even assuming arguendo that *Soto* represents a change in existing law its effect is irrelevant because (1) equal protection jurisprudence both before and after *Soto* requires that plaintiffs

1. Plaintiffs' counsel misperceives the parameters of a motion to reconsider, despite having been placed on notice of the same by the court.

show intentional discrimination based on membership in a specific class; (2) the plaintiffs were on notice that they were required to adduce evidence to meet their burden on this issue because the defendant raised it in his motion for summary judgment; and (3) in the court's judgment the plaintiffs failed adequately to meet their burden on this issue, justifying summary judgment under either *Soto* or pre-*Soto* equal protection principles. The court also rejects as without merit the plaintiffs' claims that it (1) failed to make all reasonable inferences in the plaintiffs' favor; (2) made a mistake of law; or (3) misapplied the facts to the law.

Thus, the plaintiffs' motion to amend the judgment and for reconsideration of the court's order granting summary judgment (document no. 60) is denied.

SO ORDERED.

s/ Joseph A. DiClerico, Jr.
Joseph A. DiClerico, Jr.
Chief Judge

May 7, 1997

cc: Edward M. Van Dorn Jr., Esquire
Michael Lenehan, Esquire

APPENDIX D — ENTRY OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED MARCH 14, 1997

UNITED STATES DISTRICT COURT FOR
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 1:93-cv-00112-JD

Hayden

v.

Grayson

JUDGMENT

JUDGMENT is hereby entered in accordance with the Orders dated August 19, 1993 and March 13, 1997 by Chief Judge Joseph A. DiClerico, Jr. (Signed by Clerk James R. Starr)

By the Court,

s/ James R. Starr
Clerk

Date: March 14, 1997

cc :

Edward M. Van Dorn, Jr., Esq.
Michael Lenehan, Esq.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED MARCH 13, 1997

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 93-112-JD

Jessica L. Hayden et al.

v.

Richard Grayson

ORDER

The plaintiffs, Jessica L. Hayden, Nicole C. Merrill, and Colleen M. Rhoads, brought this action under 42 U.S.C. § 1983 against the defendant, Richard Grayson, the former police chief of Lisbon, New Hampshire. The plaintiffs allege that the defendant violated their right to equal protection by failing to investigate and arrest their sexually abusive father, Hervey Gagnon. Before the court is the defendant's motion for summary judgment (document no. 41).

Background[1]

In 1983, the plaintiffs notified their mother, Sylvia Kinne, that Gagnon had sexually abused them on numerous occasions.[2]

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1. The facts relevant to the instant motion are either not in dispute or have been alleged by the plaintiff.

2. Gagnon is the stepfather and adoptive father of plaintiffs Hayden and Rhoads and the natural father of plaintiff Merrill.

In response, Kinne excluded Gagnon from the family home and subsequently divorced him. The plaintiffs then reported the abuse to the defendant, who later informed the plaintiffs that he refused to arrest Gagnon because the county attorney would not prosecute the case. In fact, the defendant had not spoken with the county attorney about the case.

In 1990, after receiving information that the defendant had failed to pursue other claims of domestic sexual abuse, the plaintiffs contacted the county attorney directly. At that time, the county attorney prosecuted Gagnon, who entered a plea bargain and was sentenced.

The plaintiffs do not allege that Gagnon sexually abused them after their initial complaint to the defendant in 1983, but instead assert that Gagnon continued to live in Lisbon and "between 1983 and 1990, harassed the Plaintiffs, causing them fear, embarrassment, and mental anguish." Amended Complaint at ¶ 17. They further claim that because of the defendant's actions "Plaintiffs have suffered and continue to suffer permanent grave emotional and psychological injuries requiring the expenditure of large sums of money for care and treatment." *Id.* at ¶ 31.

Subsequently, the plaintiffs brought this action alleging, *inter alia*, that the defendant violated their federal right to equal protection by failing to pursue their original complaint against Gagnon.[3] The defendant has moved for summary judgment on the plaintiffs' federal equal protection claim, asserting that the plaintiffs have failed to establish the necessary elements of such a claim.

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3. The plaintiffs also charge the defendant with (1) violation of their right to equal protection under the New Hampshire Constitution, (2) negligence, and (3) intentional infliction of emotional distress.

Appendix E

Discussion

The role of summary judgment is "to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *Snow v. Harnischfeger Corp.*, 12 F.3d 1154, 1157 (1st Cir. 1993) (quoting *Wynne v. Tufts Univ. Sch. of Medicine*, 976 F.2d 791, 794 (1st Cir. 1992)). The court may only grant a motion for summary judgment where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of establishing the lack of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Quintero de Quintero v. Aponte-Roque*, 974 F.2d 226, 227-28 (1st Cir. 1992). The court must view the entire record in the light most favorable to the plaintiffs, " 'indulging all reasonable inferences in [their] favor.' " *Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991) (quoting *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990)). However, once the defendant has submitted a properly supported motion for summary judgment, the plaintiffs "may not rest upon mere allegation or denials of [their] pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 256 (1986) (citing Fed. R. Civ. P. 56(e)).

In *DeShaney v. Winnebago County*, the United States Supreme Court noted that "[t]he State may not . . . selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." 489 U.S. 189, 197 n.3 (1989). In *Soto v. Flores*, 103 F.3d 1056 (1st Cir.

1997), the First Circuit addressed the issue of the standard of proof necessary to establish an equal protection violation based on a law enforcement officer's failure to provide as much protection to victims of a certain class of crime as provided to the victims of other similar crimes. In *Soto,* the court ruled that plaintiffs alleging failure by a law enforcement officer to protect victims of domestic violence who are seeking to defeat a motion for summary judgment must:

> proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom.

Id. at 1066 (quoting *Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994), itself citing *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988)). Although *Soto* deals explicitly with cases involving victims of domestic violence, the court proceeds under the assumption that these requirements also apply in cases such as this one involving domestic child sexual abuse. *See id.* at 1065-66. To satisfy this standard, the plaintiffs "must show that there is a policy or custom of providing less protection to victims of [domestic child sexual abuse] than to victims of other crimes, that . . . discrimination [against those victims] is a motivating factor, and that [the plaintiffs were] injured by the practice." *Id.* at 1066.

As a preliminary matter, the court notes that this case differs from *Soto* in significant ways. In *Soto,* the plaintiff asserted that the class of domestic violence victims was substantially

comprised of women, so the challenged policy had the effect of discriminating against women. *See id.* at 1067.

Here, however, the plaintiffs have failed to settle on exactly what group the defendant was discriminating against. The plaintiffs have asserted that the defendant discriminated against them "because the Plaintiffs were female and/or victims of domestic sexual abuse and/or child victims of sexual or domestic sexual abuse." Amended Complaint at ¶ 29.[4] Such a scattershot approach to litigation does not advance the plaintiffs' case and is not viewed favorably by the court. *See Alpha Lyracom Space Communications. Inc. v. Communications Satellite Corp.*, 946 F.2d 168, 175 (2d Cir. 1991); *Salomon S.A. v. Alpina Sports Corp.*, 737 F. Supp. 720, 726 (D.N.H. 1990); *see also Gold v. Wolpert*, 876 F.2d 1327, 1333 (7th Cir. 1989) (sanctioning counsel's scattershot approach on appeal); *Max M. v. New Trier High Sch. Dist. No. 203*, 859 F.2d 1297, 1300 (7th Cir. 1988) (observing scattershot approach taken on appeal was "antithesis of sound advocacy"). Indeed, the plaintiffs' approach has the effect of undermining their claim of invidious discrimination. By asserting seven alternative classes against one or more of which they claim the defendant may have had a custom or policy of discriminating, they present themselves as not knowing which class the defendant was actually discriminating against and undercut the force of their assertion that the defendant had a policy of invidiously discriminating against any particular named class. In spite of the plaintiffs' lack of focus, the court

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4. The court notes that the plaintiffs' disjunctive enumeration encompasses at least seven possible categories: (1) females; (2) victims of domestic sexual abuse; (3) child victims of sexual abuse; (4) child victims of domestic sexual abuse; (5) female victims of domestic sexual abuse; (6) female child victims of sexual abuse; or (7) female child victims of domestic sexual abuse.

will, as it is obliged to do, take the plaintiffs' proffered evidence in the light most favorable to them. In doing so, the court finds that the plaintiffs have stated the strongest case for the existence of a policy or custom which has the effect of invidiously discriminating against child victims of domestic sexual abuse.[5]

As noted above, to succeed in their equal protection claim, the plaintiffs must show, *inter alia*, that invidious discrimination against child victims of domestic sexual abuse was a motivating factor for the defendant's alleged custom or policy of providing less protection to those victims than to the victims of other similar crimes.[6] In other words, the plaintiffs must prove that the defendant failed to pursue their complaint at least in part "because of," rather than merely "in spite of" the adverse effect that his actions would have on them as members of a disfavored group. *See Personnel Administrator v. Feeney*, 442 U.S. 256, 274 (1979); *Soto*, 103 F.3d at 1067. The burden of proving such invidious discrimination can be onerous, for as the First Circuit has noted, "[w]ithout the smoking gun of an overtly discriminatory statement by a decisionmaker, it may be very

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5. The court reaches this conclusion because, while the plaintiffs have produced some evidence to suggest that the defendant treated crimes involving domestic sexual abuse differently than other sorts of crimes and that he treated crimes involving child victims differently than crimes involving adult victims, they have not produced evidence demonstrating that the defendant treated crimes involving female victims differently than crimes involving male victims. *See infra* note 9.

6. The court assumes for the purposes of this motion that the plaintiffs have produced enough evidence to raise a reasonable inference that the defendant had a custom of providing less protection to the child victims of domestic sexual abuse than to the victims of other similar crimes.

difficult to offer sufficient proof of such a purpose." *Id.* at 1067-68. Because the plaintiffs in this case have not provided any "smoking gun" evidence of discrimination, the court notes that they must confront and surmount this difficult obstacle in order to withstand the grant of summary judgment.[7]

In an effort to prove that the defendant in this case was motivated by an intent to discriminate against a group of which they were members, the plaintiffs have provided two forms of evidence: (1) anecdotal information about the defendant's alleged failure to pursue claims against the perpetrators of various crimes, and (2) testimony from police department employees purporting to show that the defendant had a negative attitude toward cases involving domestic child sexual abuse and treated them differently than other cases.[8] The court discusses this evidence *seriatim*.

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7. Another factor that makes it more difficult for the plaintiffs here to withstand summary judgment than was the case in *Soto* is that in *Soto* the plaintiff could rely on Puerto Rico's Law 54, a comprehensive effort to curb and criminalize domestic violence, in an effort to meet her burden of proof. Law 54 contained specific findings that domestic violence disproportionately affects women and imposed extensive reporting and arrest requirements on police officers. See 103 F.3d at 1060, 1068. In that case, the legislative findings and intent of Law 54 formed a basis from which to conclude that failure by police officers to comply with the requirements of Law 54 was motivated by an intent to discriminate against women. *See id.* at 1069. Even with Law 54, the plaintiff in *Soto* failed to meet her burden of proof on the issue of discriminatory intent. *See id.* at 1072. The court notes that New Hampshire has no comparable statutory provision on which the plaintiffs in this case can rely.

8. The plaintiffs have produced additional evidence which, if anything, tends to undermine rather than support their claim by

(Cont'd)

First, the plaintiffs have provided anecdotal evidence of two crimes involving domestic child sexual abuse, in addition to their own report of abuse by Gagnon, that they allege the defendant did not pursue.[9] They have also provided anecdotal evidence of the defendant's failure to pursue one crime involving non-domestic child sexual assault and two crimes not involving

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(Cont'd)

suggesting motives for the defendant's alleged custom that are not based on a desire to discriminate against members of a disfavored minority. For example, the plaintiffs have produced anecdotal evidence of crimes that the defendant pursued or failed to pursue depending on whether he held a personal animus toward the perpetrator. The plaintiffs suggest that the defendant did not pursue their claims against Gagnon because he had developed a favorable attitude toward Gagnon and was attempting to protect Gagnon from prosecution. As evidence of this, the plaintiffs have produced a statement by Linda Dunn, a Lisbon police officer, that "[a]ll investigations eventually went around Chief Grayson because we officers knew that he (Grayson) generally would not follow through, or allow us to, unless he had a personal interest or vendetta against a particular individual." Plaintiffs' Opposition, Ex. 2 at 1. This claim tends to undermine the plaintiffs' competing theory that the motivation for the defendant's actions was an intent to discriminate against the plaintiffs because they were members of a disfavored minority.

9. In 1990, a complaint was made about a grandfather sexually molesting his twelve-year-old grandson. According to the plaintiffs, "[a]n interview with the child was taped and later the tape disappeared while in the custody of Lisbon Police Department .... It is believed that Chief Grayson gave the tape to the accused." Plaintiffs' Objection, Ex. 2 at ¶ 2. On another occasion, the defendant allegedly failed to follow through on or allow other officers to follow through on a report of sexual abuse of a two-and-a-half-year-old child.

sexual abuse or assault.[10] The defendant, in support of his motion for summary judgment, has offered evidence of ten crimes involving males who sexually assaulted female minors in which he helped investigate, arrest, or prosecute the perpetrator.[11]

The unfocused and inconsistent nature of the plaintiffs' proffered anecdotal recitations does not advance their case because a few episodes of failure to pursue crimes, in isolation, do not give rise to any reasonable inference as to why the crimes

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10. The plaintiffs allege that the defendant blocked investigation of a complaint involving a gang rape of a thirteen-year-old girl. The two incidents involving other crimes are as follows: (1) the defendant allegedly released, without administering a breathalyzer test, a driver brought in after failing a field sobriety test; and (2) the defendant failed to follow through on or allow other officers to follow through on a report that a group of teenagers, some of whom were specifically identified in the report, burglarized and vandalized a home.

11. The probative value of the defendant's proffered evidence is limited by the amoebic nature of the plaintiffs' claim. Only two of the ten cases relied on by the defendant involve child victims of domestic sexual abuse. The eight remaining cases appear, in the light most favorable to the plaintiffs, to involve child victims of non-domestic sexual abuse or assault. Despite the fact that little of the defendant's evidence addresses directly the category for which the plaintiffs have made the strongest showing, in the summary judgment framework, his proffered evidence coupled with his assertion (of otherwise limited value because of its self-serving character) that he has "never refused to prosecute a male for sexual assault because his victim was a female minor," satisfies his burden of demonstrating the lack of a genuine issue of material fact on the issue of his alleged discriminatory animus and shifts the burden to the plaintiffs to show that a genuine material factual dispute remains for trial.

were not pursued. The plaintiffs themselves have suggested several possible motives for the defendant's behavior. However, their proof on this point does not provide any rational basis on which a fact finder could reasonably choose between those motives. Thus, the plaintiffs' anecdotal evidence is ineffective to raise a genuine issue of material fact tending to show that a motivating factor behind the defendant's failure to pursue the crimes was an intent to discriminate invidiously against the child victims of domestic sexual abuse.

The plaintiffs' evidence concerning the defendant's negative attitude toward cases involving domestic child sexual abuse comes in two forms: (1) evidence that the defendant's approach to their case was "typical of old time police work," Plaintiffs' Objection, Ex. 1 at ¶ 11, indicating an attitude that "interfamily sex abuse is something that is sometimes better left to the family and [is] not always appropriately handled by the criminal justice system," *id.*, Ex. 1 at ¶ 12, and (2) evidence that the defendant kept the files for this and other cases involving domestic child sexual abuse in a safe, located separate from other files, to which only he had access. The plaintiffs' evidence concerning the defendant's negative attitude toward cases involving domestic child sexual abuse also fails to raise a reasonable inference that the defendant's custom of providing less protection to members of a disfavored minority was motivated by a desire to discriminate against members of that group.

First, the plaintiffs' "proof" of the defendant's purported "old time" attitude is wholly insufficient to raise a genuine issue of material fact on the issue of the defendant's alleged discriminatory motive. Donna Ransmeier, who has known the defendant only since 1986 (some three years after the plaintiffs' initial complaint) asserts:

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> Based on [her] exposure to the general police community, [she] was aware of the attitude among older police officers in handling domestic violence and not prosecuting these cases. For example, as a friend of retired Littleton Police Chief Stan MacIntyre, he expressed the belief that interfamily sex abuse is something that is sometimes better left to the family and was not always appropriately handled by the criminal justice system. [Her] impression is that [the defendant] may have had the same attitude in his approach to the Gagnon case the first time that it surfaced.

Plaintiffs' Opposition, Ex. 1 at ¶ 12.[12] This purely speculative assertion simply does not provide a sufficient basis for a fact finder reasonably to infer that the defendant's presumed custom of providing less protection to the child victims of domestic sexual abuse than to the victims of other similar crimes was motivated by the defendant's desire to provide less protection to those victims or any other group to which the plaintiffs might belong. Even in the light most favorable to the plaintiffs, the defendant's purported "old time" attitude at most tends to show that the defendant had a custom of providing less protection to some child victims of domestic sexual abuse based on the desire of the non-abusive parent. While the *Soto* court noted that old-fashioned attitudes or "archaic stereotypes" sometimes betoken unlawful discrimination based on factors such as gender, the court is not aware of any historical basis for a bias against child victims of domestic sexual abuse that would allow a fact finder reasonably to conclude that a policy of providing a disparate level of protection alone warrants an inference that the policy

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12. The court assumes without deciding that this evidence meets the admissibility requirements of Fed. R. Civ. P. 56(e).

was motivated by a desire to discriminate invidiously. See 103 F.3d at 1070. As other courts have noted, there are rational non-discriminatory reasons to treat certain types of crime differently than others. *See Eagleston v. Guido,* 41 F.3d 865, 878 (2d Cir. 1994) ("Nothing in the Constitution requires that arrest policies be uniformly applied in all situations. 'Because of the inherent differences between domestic disputes and non-domestic disputes, legitimately different factors may affect a police officer's decision to arrest or not to arrest in any given situation.' ") (quoting *Ricketts v. City of Columbia*, 36 F.3d 775, 781-82 (8th Cir. 1994)). An "old time" attitude alone is insufficient — to be actionable it must be supported by some competent evidence that the attitude is motivated by an intent to discriminate invidiously against an identifiable minority.

Second, the defendant's storage, in a separate location from "all other files including juvenile," Plaintiff's Opposition, Ex. 2 at 2, of the files for this and other cases he failed to pursue might at best tend to show the existence of a custom of treating cases involving child domestic sexual assault differently than other cases. However, such a practice does not give rise to a reasonable inference that the defendant treated those cases differently because of an intent to discriminate invidiously against members of an identifiable minority. No reasonable fact finder could conclude, based on this paucity of evidence, that the reason for the defendant's behavior was an intent to discriminate against the plaintiffs.

In summary, the plaintiffs' evidence, even taken in the light most favorable to them, is simply too insubstantial to form a basis for any reasonable inference which would support their contention that the defendant provided less protection to them because of his desire to discriminate invidiously against

members of an identifiable minority. Thus, the court finds that the plaintiffs have failed to meet their burden of demonstrating the existence of a genuine issue of material fact to support their claim that the defendant acted with an invidiously discriminatory motive.[13]

Conclusion

For the reasons stated above, the defendant's motion for summary judgment (document no. 41) is granted as to the plaintiffs' federal equal protection claim. The court declines to exercise jurisdiction over the plaintiffs' claims arising under New Hampshire law. The clerk is ordered to close the case.

SO ORDERED.

s/ Joseph A. DiClerico, Jr.
Joseph A. DiClerico, Jr.
Chief Judge

March 13, 1997

cc: Edward M. Van Dorn Jr., Esquire
Michael Lenehan, Esquire

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13. Because of the court's decision, it need not consider the issue of whether the plaintiffs have provided sufficient evidence to raise a reasonable inference that the defendant's policy caused them a legally cognizable harm.

APPENDIX F — AMENDED COMPLAINT TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE DATED JANUARY 17, 1995

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

Docket No. 1:93-cv-00112-JD

Jessica Hayden, et al.,

Plaintiffs,

v.

Richard A. Grayson, et al.,

Defendants.

AMENDED COMPLAINT

For their Complaint, Plaintiffs state as follows:

1. In this action, arising under 42 U.S.C. § 1983, Plaintiffs seek monetary damages resulting from Defendants' violations of the rights of Plaintiffs Jessica Hayden, Colleen Rhoads, and Nicole Merrill to equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution and by the New Hampshire Constitution. Plaintiffs also seek damages under the common law of New Hampshire.

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Jurisdiction

2. The Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1343, and 1367.

Parties

3. Plaintiffs Colleen Rhoads, f/k/a Colleen Gagnon, Jessica Hayden, f/k/a Jessica Gagnon, were born in 1962 and 1966 respectively. Colleen and Jessica are full sisters. Their mother, Sylvia Kinne, f/k/a Sylvia Gagnon, divorced their natural father in 1967, and in 1968 married Hervey Gagnon, who became the adoptive father of Colleen and Jessica.

4. Plaintiff Nicole Merrill, f/k/a Nicole Gagnon, was born on October 21, 1970 and is half-sister to Plaintiffs Colleen Rhoads and Jessica Hayden. Nicole's biological parents are Sylvia Kinne and Hervey Gagnon.

5. Defendant Richard Grayson resides in Lisbon, New Hampshire and at all relevant times was Chief of Police of the Town of Lisbon, New Hampshire. As the Chief of Police, Defendant Grayson had final policymaking authority in the Town police department, was the highest ranking police official in the Town, and was responsible for the entire department, including the formulation of department policies and procedures.

6. Defendant Town of Lisbon ("Town") is a municipal corporation organized under the laws of the State of New Hampshire.

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Statement

7. The Town of Lisbon is one the highest crime areas in northern Grafton County. On information and belief, much or most of the crime committed in this high crime area involves domestic violence and sexual abuse.

8. Defendant Grayson was appointed as Defendant town's police chief in 1975, and prior to that had been a police officer for only two years. In 1975 when he was appointed, Defendant Grayson did not have the experience or training necessary to become a police chief for a New Hampshire town.

9. From the time he was appointed, Defendant town has not required any training courses — and Defendant Grayson has not taken any training courses — relevant to police work or to his work as a police chief or to investigating sexaul abuse cases. In fact, Defendant town has not required attendance at -- and Defendant Grayson did not attend — the New Hampshire Council for Police Training and Standards academy, nor has Defendant town required membership or participation in — and Defendant Grayson has not been a member or participant in — the New Hampshire Police Chiefs Association, which is crucial to keeping up with recent developments in law enforcement.

10. In or about 1977, Plaintiffs moved to Lisbon, New Hampshire from Massachusetts with their parents Sylvia Kinne and Hervey Gagnon.

11. Hervey Gagnon subjected all three Plaintiffs to sexual abuse for many years from the time each was a young child. Most or much of this sexual abuse occurred in the Gagnon family home in Lisbon, New Hampshire.

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12. For Colleen and Jessica, the abuse continued until sometime in their teenage years.

13. For Nicole, the abuse continued until 1983, when Hervey Gagnon's abuse of the three Plaintiffs was disclosed for the first time to Sylvia Kinne. At that time, Sylvia Kinne removed Hervey Gagnon from the family home.

14. In 1983, Plaintiffs complained of Hervey Gagnon's sexual abuse to Defendant Grayson, who at the time was the Town's Chief of Police. The Plaintiffs' complaints were comprehensive and sufficiently detailed to warrant an investigation, charges and indictment against Gagnon on charges of felonious sexual assault.

15. Shortly after Plaintiffs reported Gagnon's sexual abuse to Grayson, Grayson told them that the Grafton County Attorney refused to bring charges against Gagnon for his sexual abuse of the three Plaintiffs.

16. In fact, Defendant Grayson had not discussed the Plaintiffs' complaints against Gagnon with the Grafton County Attorney and failed to conduct an investigation or take any other action on the complaints.

17. After being removed from the Plaintiffs' home, Hervey Gagnon continued to live in the Town and between 1983 and 1990, harassed the Plaintiffs, causing them fear, embarrassment, and mental anguish.

18. Despite Grayson's knowledge of the charges against Gagnon, Grayson continued to associate with Gagnon in a friendly manner. This association often took place in the presence of the Plaintiffs and Grayson knew or should have known that they were aware of it.

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19. Grayson's failure to act on the Plaintiff's complaints and continued association with Gagnon had grave psychological and emotional consequences for the Plaintiffs.

20. In early 1990, Plaintiffs gave statements concerning Gagnon's sexual abuse to Lisbon Police Officer Linda Dunn, who brought them to the attention of the Grafton County Attorney. These statements were substantially similar to the statements given to Grayson in 1983.

21. In March 1990, a Grafton County grand jury indicted Gagnon on charges of aggravated felonious sexual assault of the Plaintiffs. The charges with respect to Plaintiff Colleen Rhoads were subsequently dismissed because the statute of limitations on those charges had run.

22. Defendant Grayson attempted to delay and prevent the prosecution of Gagnon.

23. In 1991, Gagnon was convicted of aggravated felonious sexual assault after a plea of guilty and was sentenced to eleven to twenty-two years in the state prison.

24. Defendant Grayson's failure to investigate or otherwise act on Gagnon's sexual abuse of Plaintiffs and his refusal to pursue criminal charges against Gagnon was motivated in whole or in part by an intent to discriminate against Plaintiffs because they are female and/or victims of domestic sexual abuse and/or child victims of sexual or domestic sexual abuse.

25. As a direct and proximate result of Defendant Grayson's failure to investigate and prosecute Gagnon, and as a result of Grayson's continued association with Gagnon, Plaintiffs suffered and continue to suffer grave emotional and psychological injuries and distress.

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COUNT I

42 U.S.C. § 1983
Equal Protection — U.S. Const. amend. XIV
New Hampshire Constitution — Part I, arts. 2

26. The preceding paragraphs are incorporated by reference as if fully stated herein.

27. At all relevant times, Defendant Grayson was acting under color of state law and was the highest ranking police official in the Town, and was responsible for the entire police department, including the formulation of department policies and procedures.

28. Under the fourteenth amendment to the United States Constitution and under the New Hampshire Constitution, Plaintiffs had a right to equal protection under the law.

29. Defendant Grayson, acting pursuant to the policy he formulated as the highest policymaking official for Town police matters, violated the Plaintiffs' right to equal protection under the law by failing to investigate and refusing to seek criminal prosecution of Gagnon because the Plaintiffs were female and/or victims of domestic sexual abuse and/or child victims of sexual or domestic sexual abuse.

30. Defendant town had a policy or custom of failing to train Defendant Grayson and its other police officers in law enforcement, and particularly of failing to train to deal with domestic violence and sexual abuse crimes, which, on information and belief accounts for much or most of the crime committed in the Town of Lisbon. Defendant Town's failure to

train amounted to deliberate indifference to the rights of person such as Plaintiffs who came into contact with Defendant Grayson and other town police officers.

31. As a direct and proximate result of Defendant Grayson's violation of their right to equal protection of the laws, Plaintiffs have suffered and continue to suffer permanent grave emotional and psychological injuries requiring the expenditure of large sums of money for care and treatment.

WHEREFORE, Plaintiffs request judgment against Defendants Richard Grayson and the Town of Lisbon jointly and severally for compensatory and punitive damages, attorney fees, costs of this suit, and such other relief as the Court deems just and equitable.

COUNT II
Negligence

32. The preceding paragraphs are incorporated by reference as if fully stated herein.

33. Defendant Grayson, as the Town's Chief of Police, owed a duty to victims of crimes committed in the Town to investigate those crimes and to charge and seek prosecution of the perpetrators of those crimes when he knew or should have known that failure to investigate, charge and/or prosecute perpetrators would result in harm to the victims of said crimes.

34. By failing to investigate, charge and seek criminal prosecution of Gagnon, Defendant Grayson breached that duty.

35. Defendant Grayson knew or should have known that as a result of his failure to investigate Gagnon's crimes against

Plaintiffs and his refusal to seek prosecution for those crimes, and his continued association with Gagnon, Plaintiffs would suffer harm.

36. As a direct and proximate result of Defendant Grayson's breach of his duty to investigate and seek prosecution of Gagnon, and his continued association with Gagnon, Plaintiffs have sustained permanent grave emotional and psychological injuries requiring the expenditure of large sums of money for care and treatment.

37. As Defendant Grayson's employer, Defendant Town is liable for his negligence.

38. Defendant Grayson's failure to investigate Gagnon and to prosecute him for crimes he committed against Plaintiffs resulted from Defendant Town's negligent hiring, supervision, and training.

WHEREFORE, Plaintiffs request judgment against Defendants Richard Grayson and the Town of Lisbon jointly and severally for compensatory and enhanced compensatory damages, costs of this suit, and such other relief as the Court deems just and equitable.

COUNT III
Intentional Infliction of Emotional Distress

39. The preceding paragraphs are incorporated by reference as if fully stated herein.

40. Defendant Grayson's failure to investigate Gagnon's crimes and to seek prosecution of those crimes and his continued

association with Gagnon when he knew of the allegations against him and when he or should have known that the perpetrator would continue to cause harm to the Plaintiffs, and when he knew that his failure to act on the charges and his continued association with Gagnon would distress the Plaintiffs, constituted intentional and reckless disregard for the Plaintiffs' safety and well being and amounted to extreme and outrageous conduct which caused Plaintiffs to suffer severe emotional distress.

WHEREFORE, Plaintiffs request judgment against Defendants Richard Grayson and the Town of Lisbon jointly and severally for compensatory and enhanced compensatory damages, costs of this suit, and such other relief as the Court deems just and equitable.

Respectfully Submitted,
JESSICA L. HAYDEN
NICOLE C. MERRILL
COLLEEN M. RHOADES

By Their Attorneys
VAN DORN & CULLENBERG
45 Lyme Road, Suite 200
Hanover, NH 03755
(603) 643-1616

Appendix F

Date: January 17, 1995 By: s/ Edward M. Van Dorn, Jr.
Edward M. Van Dorn, Jr. (2608)

CERTIFICATE OF SERVICE

I hereby certify that on this date I served Michael Lenehan, Esq. with a conformed copy of the within Amended Complaint by depositing the same in the United States mail, postage prepaid, addressed to Michael Lenehan at his address of record.

Date: January 17, 1995 By: s/ Edward M. Van Dorn, Jr.
Edward M. Van Dorn, Jr. (2608)

Supreme Court, U.S.
FILED
JUN 2 1998
CLERK

No. 97-1781

In The

Supreme Court of the United States

October Term, 1997

JESSICA L. HAYDEN, NICOLE C. MERRILL and COLLEEN M. RHOADS,

Petitioners,

vs.

RICHARD GRAYSON, CHIEF OF POLICE OF THE TOWN OF LISBON, N.H.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN T. ALEXANDER
Counsel of Record
RANSMEIER & SPELLMAN
PROFESSIONAL CORPORATION
Attorneys for Respondent
One Capitol Street
P.O. Box 600
Concord, NH 03302-0600
(603) 228-0477

146642

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

QUESTION PRESENTED

Did the First Circuit err in holding that proof of discriminatory motive is needed to sustain an equal protection claim?

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STATEMENT OF THE CASE

In 1983, the petitioners told respondent Richard Grayson, Chief of Police of the Town of Lisbon, New Hampshire, that they had been sexually assaulted by Hervey Gagnon (stepfather of two of the petitioners and natural father of the third). Chief Grayson later told them that the county attorney would not prosecute the case. In 1990 the petitioners raised their complaint again. The county attorney was contacted; Gagnon was prosecuted and sentenced to a term in prison. All other facts are disputed.[1] Specifically, Grayson denies that he was negligent toward the petitioners, that he lied to the petitioners, and that he had a policy of nonintervention in domestic sexual assault cases.

The United States District Court for the District of New Hampshire granted Grayson summary judgment as to the petitioners' Section 1983 equal protection claim, based on a finding that they had not established a discriminatory motive on the part of Grayson. The First Circuit Court of Appeals affirmed.

The petitioners have incorrectly framed the question presented to this Court for review. Their phrasing includes at least three unwarranted assumptions: (1) that a discriminatory policy existed; (2) that punishment of a criminal within a given time period is the same as "protection" of the victim;[2] and (3) that the issue is whether a hypothetical policy would be

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1. Among the disputed facts are the statements of the petitioners' mother that she did not want Gagnon prosecuted.

2. At pages 3-4 of their petition, the petitioners misstate the sequence of pertinent events. Gagnon's sexual assaults had ended long before the petitioners and their mother made statements to Grayson in October and November of 1983. Even the incident with the telephone (Petition, p. 4) occurred four months *before* they met with Grayson.

prohibited by the Equal Protection Clause, rather than whether the petitioners were injured by operation of such a policy.

An accurate statement of the question at issue would be:

> *Did the First Circuit err in holding that proof of discriminatory motive is needed to sustain an equal protection claim?*

A petition for writ of certiorari will be granted only for compelling reasons. Supreme Court Rule 10. The petitioners are incorrect when they contend that the First Circuit's decision conflicts with prior decisions of this Court, or that circuit courts disagree, or that an important issue of federal law remains unsettled. The decision from the Court of Appeals is consistent with precedent from this Court and other circuits, and the question of whether a plaintiff must show discriminatory intent in an equal protection claim has been resolved without ambiguity.

REASONS FOR DENYING THE WRIT

I.

THE FIRST CIRCUIT CORRECTLY RULED THAT PROOF OF DISCRIMINATORY MOTIVE IS NEEDED TO SUSTAIN AN EQUAL PROTECTION CLAIM.

The gist of the petitioners' argument is that a showing of discriminatory intent is unnecessary where a plaintiff alleges the existence of a policy which facially discriminates against victims of a particular crime.[3] Their view is not supported by the decisions of the federal courts.

---

3. The distinction between facially discriminatory and facially neutral policies was not raised in the petitioners' First Circuit brief or argued orally below.

As the Tenth Circuit has stated succinctly:

> to survive summary judgment, the plaintiff must go beyond her pleadings and show that she has evidence of specific facts that demonstrate that it is the policy or custom of the defendants to provide less police protection to victims of domestic assault than to other assault victims. She must also provide evidence that discrimination was a motivating factor for the defendants and that she was injured by operation of the policy or custom.

Watson v. City of Kansas City, Kan., 857 F.2d 690, 694 (10th Cir. 1988).

A showing of disproportionate impact alone is not enough to establish a constitutional violation. *See Washington v. Davis*, 426 U.S. 229, 242 (1976). A plaintiff seeking to prove an equal protection violation must show that the relevant policy-makers and actors were motivated, at least in part, by a discriminatory purpose. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *Personnel Administrator v. Feeney*, 442 U.S. 256, 274 (1979). This Court has defined discriminatory purpose as:

> more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a course of action at least in part "because of," not merely "in spite of" its adverse effects upon an identifiable group.

442 U.S. at 279. The First Circuit followed this reasoning in *Soto v. Flores*, 103 F.3d 1056, 1067 (1st Cir. 1997), and followed *Soto* in the present case.

The cases cited by the petitioners simply confirm this principle. *See Wayte v. United States*, 470 U.S. 598, 608-9 (1985). This is true even in the Ninth Circuit, where petitioners claim the law is different. In *Navarro v. Block*, 72 F.3d 712 (9th Cir. 1995), for example, the court found that "a long line of Supreme Court cases make clear that the Equal Protection Clause requires proof of discriminatory *intent* or *motive*." 72 F.3d at 716 (emphasis in original).

Some courts have allowed equal protection claims to go forward where there is *uncontradicted evidence* of a policy of police nonintervention in domestic assault cases. *Navarro v. Block*, 72 F.3d 712 (9th Cir. 1995); *Smith v. City of Elyria*, 857 F. Supp. 1203 (N.D. Ohio 1994); *Cellini v. City of Sterling Heights*, 856 F. Supp. 1215 (E.D. Mich. 1994). The common thread of these cases is a factual finding that the evidence supported the plaintiffs' claim that the defendants discriminated against them *because of* their status as victims of domestic violence, and therefore may have had a discriminatory motive. In the present case, the District Court found no evidence of discriminatory motive.

II.

PETITIONERS MISCONSTRUE THE MEANING OF A "FACIALLY" DISCRIMINATORY POLICY.

The petitioners maintain, in essence, that any policy which draws a distinction between classes of citizens is facially discriminatory, and that in such cases no proof of intent is needed. The only exception, they assert, is where a plaintiff claims discrimination based on a protected status such as race or gender, in which case the plaintiff must establish discriminatory intent. This position is both illogical and contrary to precedent.

There is an old line of cases supporting the proposition that some laws are so obviously based on a discriminatory motive (*i.e.*, a desire to harm) that further evidence of the lawmaker's intent is not needed. In *Strauder v. West Virginia*, 100 U.S. 303 (1880), the Court found that the obvious purpose of a statute prohibiting blacks from serving on juries was to create a disadvantage for black defendants, and ruled the statute unconstitutional on its face.

In *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920), the Court held that a tax statute (the existence and terms of which were not in dispute) violated the Equal Protection Clause by exempting certain corporations according to an "illusory" classification. Justices Brandeis and Holmes dissented, noting that the Fourteenth Amendment

> forbids merely inequality which is the result of clearly arbitrary action and, particularly, *of action attributable to hostile discrimination against particular persons or classes.*

253 U.S. at 417-18 (emphasis added). It is that line of reasoning which this Court has followed.

It is not a foregone conclusion that a policy of police nonintervention in domestic assault cases must be based on a desire to harm victims of such assaults. What the petitioners interpret as the First Circuit volunteering a rational basis for differentiating between types of crimes is actually analysis of whether a desire to harm victims is the only plausible explanation for the alleged policy.

It is not. There was no evidence that Grayson held a secret grudge against domestic assault victims. In fact, the petitioners themselves provided a variety of other motivations for Grayson's alleged actions.

III.

THE PETITIONERS FAILED TO ESTABLISH THAT GRAYSON HAD A DISCRIMINATORY POLICY OR A DISCRIMINATORY MOTIVE.

The petitioners allege that Chief Grayson failed to act on their complaint because they were minors and/or females and/or victims of domestic assault. As the District Court noted, this scattershot approach demonstrates that they have no idea what motivated Grayson. Summary Judgment Order, Petition, App. E at 24a. In the present petition they abandon the claims based on gender and age.

Twice, the petitioners aver that the District Court "stated" and "recognized" that they had "produced enough evidence to raise a reasonable inference that the defendant had a custom [of discriminating against certain victims]." Petition, pp. 5, 6-7. Surprisingly, they neglect to quote the first few words of the Court's sentence: "The court *assumes for the purposes of this motion* that the plaintiffs have produced enough evidence . . . ." Summary Judgment Order, Petition, App. E at 25a, n.5 (emphasis added).

In fact, the petitioners produced virtually no evidence that Grayson had a custom or a policy of providing less protection to child victims of domestic sexual abuse than to the victims of other similar crimes.[4] Such evidence as they did produce suggested a host of alternative explanations for Grayson's alleged conduct. *See* Summary Judgment Order, Petition, App. E at 28a-31a. Far from finding that they had produced enough evidence to support their claim of a policy of discrimination, the District Court held that:

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4. They ignore the evidence produced by Grayson showing that he did indeed investigate and prosecute crimes committed against minors, females, and victims of domestic assault.

> No reasonable fact finder could conclude, based on this paucity of evidence, that the reason for the defendant's behavior was an intent to discriminate against the plaintiffs.

Summary Judgment Order, Petition, App. E at 31a.

IV.

THE LOWER COURTS DID NOT ERR IN DECLINING TO APPLY A RATIONAL BASIS TEST.

The petitioners wish to skip the first step of an equal protection analysis — discriminatory motive — and proceed directly to a rational basis analysis, even though Grayson denies he had a nonintervention policy. The petitioners assert that Grayson's "failure to articulate a rational basis for the policy should have been fatal to his summary judgment motion." Petition, pp. 7-8. By this unusual logic, summary judgment may never be granted so long as a plaintiff alleges a discriminatory policy and the defendant denies its existence. Both the District Court and the First Circuit correctly declined to make a rational basis determination, ruling instead on the dispositive threshold issue of discriminatory motive.

CONCLUSION

For the reasons stated above, the writ of certiorari should be denied.

Respectfully submitted,

JOHN T. ALEXANDER
Counsel of Record
RANSMEIER & SPELLMAN
PROFESSIONAL CORPORATION
Attorneys for Respondent
One Capitol Street
P.O. Box 600
Concord, NH 03302-0600
(603) 228-0477